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HON. JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY, and STEPHEN L. JOHNSON, Acting Administrator) Defendants. vs. AMERICAN CROP PROTECTION ASSOC. et al Intervenor-Defendants	Case No. C01-0132 C **OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY JULY 2, 2002 ORDER** NOTED ON MOTION CALENDER: MARCH 25, 2005

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Plaintiffs' motion to modify is a thinly veiled attempt to bootstrap onto existing litigation a new challenge to EPA administrative action by claiming that EPA has breached this Court's July 2, 2002 Order. The July 2 order set a schedule for EPA to make effects determinations for certain pesticides. EPA complied with that schedule, as plaintiffs concede.[1]/ Nonetheless, because plaintiffs take issue with the underlying scientific methodology used by EPA in making these effects determinations, they allege a breach of the Court's order. They assert that if they disagree with how EPA made these determinations, it amounts to a breach of this Court's order that dictated by when EPA was required to make these determinations.

The Court should deny plaintiffs any new relief because EPA has not breached the Court's order. Plaintiffs are free to bring an action at the appropriate time, in accordance with the Endangered Species Act and the Administrative Procedure Act ("APA"), that challenges the substance of any final agency actions, such as EPA's "no effect" determinations or Service biological opinions. To the extent their concern is with the pace of those consultations rather than any final agency action, they may pursue a separate challenge for unreasonable delay. But, they may not bootstrap such administrative claims onto existing litigation under the guise of breach.

If the Court elects to entertain plaintiffs' claims that the underlying scientific method used by EPA is deficient and that EPA failed to use the best available science in making its effects determinations, the Court must evaluate EPA's agency actions under the standards of the APA.

I. EPA HAS FULLY COMPLIED WITH THE JULY 2, 2002 ORDER.

In the instant motion, plaintiffs allege that EPA has failed to comply with the Court's order to make effects determinations for 55 pesticides pursuant to a 2 & ½ year schedule. They allege that EPA is in breach of the order because EPA's scientific methodology used to make the effects determinations is somehow flawed. Therefore, they argue, in order to obtain compliance with its original order, this Court should set a new schedule for EPA to make new determinations.

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[1]/ Plaintiffs concede that EPA has abided by the schedule set by this Court. Plaintiffs Motion to Modify at 2.

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The plaintiffs' brief conveniently fails to set forth the legal standard under which they would be entitled to additional new relief, because in light of EPA's full compliance with the Court's schedule, it is an impossible standard for them to meet.

A. The Legal Standards The Plaintiffs Must Satisfy

The Court has the inherent authority to enforce its orders where a party has failed to comply with or breached an order. The most analogous legal standards for relief where a party has breached an order are the standards for finding contempt. See Shillitani v. United States, 384 U.S. 364, 370 (1966); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993). Courts use this power as "a remedial sanction used to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (quoting National Labor Relations Board v. Blevins Popcorn, 659 F.2d 1173, 1184 (D.C. Cir. 1981)); see also Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992).

The standard for obtaining relief for a party's breach of a court order is well settled: The moving party has the burden of showing by clear and convincing evidence that the breaching party violated a specific and definite order of the court. In Re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002). FTC v. Affordable Media, 179 F.3d 1228, 1239 (9th Cir. 1999) (only after plaintiffs have met their burden demonstrating breach does the burden shift to defendants to demonstrate an inability to comply) (citing Stone v. City and County of San Francisco, 968 F.2d 850, 856 n. 9 (9th Cir. 1992)). Furthermore, "the 'extraordinary nature' of this type of remedy leads courts to 'impose it with caution.'" S.E.C. v. Life Partners, Inc., 912 F. Supp. 4, 11 (D.D.C. 1996) (quoting Joshi v. Professional Health Servs., Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987)). Relief for breach of an order should not be entertained, "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." Life Partners, 912 F. Supp. at 11 (citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co., 767 F.2d 882, 885 (Fed. Cir. 1985)). A party so charged may defend itself on the grounds that it substantially complied with the court order. See

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General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986).

B. The Plaintiffs Fail to Satisfy The Legal Standards For the Relief They Seek Because EPA Has Complied With the Court's July 2, 2002 Order

There is no evidence, let alone clear and convincing evidence, that EPA has failed to make effects determinations according to the schedule set forth in the July 2, 2002 order. The Court's July 2 Order required EPA to "make effects determinations and consult, as appropriate" for each of the 55 pesticides according to a prescribed schedule. Order at 17-18. EPA has done precisely that.

1. EPA has made Effects Determinations, as Required by the Court

The EPA effects determinations are set forth at http://www.epa.gov/oppfead1/endanger/effects/ and they were made in accord with the schedule set by the Court. For those pesticides and salmon ESUs for which EPA determined its action had "no effect," no further action was taken. Southwest Center for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1447, 1448 (9th Cir. 1996) (ESA consultation requirements not triggered where the action agency has made a "no effect" determination); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (same). For those pesticides and salmon ESUs for which EPA determined the action was anything other than "no effect," EPA initiated consultation with the National Marine Fisheries Service ("NMFS").[2]/. EPA remains in consultation with NMFS at this time. See EPA Letter, exhibit 2; NMFS Letter, exhibit 3.

The plaintiffs' original action alleged a violation of law because EPA had failed to take an action, *i.e.* make determinations to enable it to engage in consultation with NMFS for its registrations of pesticides as necessary. They sought and received a schedule under which the EPA would be compelled to take that action. EPA has taken the actions under that schedule. Significantly, the plaintiffs do not allege that EPA's actions are some how a sham or

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[2]/ See exhibit 1, which is a request for initiation of consultation for Phorate. This is an example of the initiation letters sent by EPA, which are available on the EPA website.

disingenuous, but rather that they disagree with the methodology and content of the actions. However, the Court's order neither addresses nor dictates the specific scientific criteria EPA must utilize. As such, plaintiffs' criteria are not clear and unambiguous terms of the Court's order. Accordingly, arguments that EPA should have used one approach or another, or disagreements about the method used by EPA, do not support an argument in favor of a breach of the Court's order.

Where, as here, an agency is sued for failing to take an action, is ordered by a court do so, and does indeed take that action, a plaintiff's cause of action in that suit is vindicated. If plaintiffs believe that the actions taken by EPA are somehow flawed, their remedy lies not in continuation of the original action through breach allegations, but rather in new litigation attacking the substance of the agency decision at the appropriate time. Such a challenge to regulatory action is governed by the standards found in the APA: review is limited to the agency record, and may be overturned only if the agency acted in an arbitrary and capricious way.[3]/ Indeed, plaintiffs recognized as much, by submitting a sixty-day notice to sue EPA for the very alleged deficiencies they now claim constitute non-compliance. See Notice of Intent to Sue, Plaintiffs' Exhibit 1. Nonetheless, plaintiffs' motion to modify seeks to side-step the proper legal avenue and standard of review for agency action with spurious allegations of breach. This Court should not allow plaintiffs to do so. The EPA has fully complied with this Court's schedule, the plaintiffs have failed to show clear and convincing evidence that EPA has failed to do so, and the motion should be denied.

2. EPA has properly initiated consultation when required to do so

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[3]/ See 5 U.S.C. § 701 et seq; 5 U.S.C. § 706(2)(A)-(D); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (under 5 U.S.C. § 706(2)(A) the standard for judicial review of an action by NMFS is whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1985) (review is on record created by agency) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)); Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998) ("APA review of agency action is normally confined to the agency's administrative record");

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Plaintiffs' claim that EPA has not properly initiated consultation is also meritless. The July 2, 2002 order did not prescribe the form of consultation EPA must use to initiate any required consultation. Thus, EPA, at its discretion, could do so by utilizing the procedures for either informal or formal consultation set forth in the Service regulations at 50 C.F.R. Part 402.[4]/ Plaintiffs' motion misconstrues the regulatory provisions for initiating consultation, either formal or informal. When properly construed, it is evident that there is no legal deficiency to EPA's initiation of consultation.

Informal consultation is an optional process comprised of all discussions and correspondence between the Service or NMFS and an action agency prior to formal consultation, if required. 50 C.F.R. § 402.02. Informal consultation allows the resource agencies to assist the action agency in determining whether the action agency's proposed action is likely to adversely affect a threatened or endangered species so as to trigger the need for formal consultation. *See, e.g.*, Preserve Endangered Areas of Cobb's History, Inc. (PEACH) v. United States Army Corps of Eng'rs, 916 F. Supp. 1557, 1569 (N.D. Ga. 1995), *aff'd,* 87 F.3d 1242 (11th Cir. 1996).

The consultation regulations do not specify any requirements placed upon EPA before it is deemed to have initiated informal consultation. See 50 C.F.R. §402.13. Indeed, the regulations provide that informal consultation includes all discussions and correspondence between NMFS and the action agency (here EPA), and further contemplate that during the period of informal consultation the consulting agency may make suggestions to the action agency regarding the action. Id. Plaintiffs' attempts to impose some formalistic requirements onto this process simply are not supported by the regulations setting up the process of informal consultation. EPA could have initiated informal consultation pursuant to the July 2, 2002, order through any form of communication – including a telephonic discussion if it chose to do so. EPA's substantial effects determinations and requests for NMFS' concurrence on its not likely to adversely affect

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[4]/ Or now, EPA may utilize the new counterpart regulations for consultation as well. See 50 C.F.R. §§ 402.40 - 402.48.

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determinations more than amply meet the definition of informal consultation. For each pesticide/salmon ESU combination that EPA has determined may affect but is not likely to adversely affect, EPA has initiated and remains in informal consultation.

Plaintiffs' claims that EPA's requests for formal consultation are legally deficient are also undermined by the plain regulatory language. Formal consultation typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and concludes with the issuance of a biological opinion by the consulting agency. 50 C.F.R. § 402.14(*l*)(1). Unlike for informal consultation, the regulations for formal consultation set forth certain criteria for initiation of formal consultation. 50 C.F.R. §402.14 (c) (this section is entitled "initiation of formal consultation"). These criteria include providing a description of the action to be taken, the specific area that may be affected by the action, any listed species or critical habitat that may be affected by the action, the manner in which the action may affect the species or critical habitat and analysis of cumulative effects, relevant reports, and other available information. 50 C.F.R. §402.14(c). EPA's requests to initiate formal consultation have met these criteria, providing all of this information and more. Even if they did not, they more than amply satisfy the requirements for initiating informal consultation, which again, would be sufficient to satisfy the requirements of the July 2, 2002 order.

Notably, plaintiffs do not contend that any of the enumerated information for initiating formal consultation set forth in 50 C.F.R. §402.14(c) is absent. Instead, plaintiffs contend that EPA purportedly did not "make effects determinations and consult as appropriate" as required by the Court's order because, in plaintiffs' view, EPA did not submit the best available information. However, while the plaintiffs are correct that the action agency has a responsibility to provide the best scientific and commercial data available to the Services, that requirement appears in 50 C.F.R. §402.14(d), and is therefore not a condition <u>for the initiation</u> of consultation like the items identified in §402.14(c), but is rather a responsibility that must be met during the consultation. Indeed, 50 C.F.R. §402.14(d) states, "[t]he Federal agency requesting formal consultation shall

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provide the Service with the best scientific and commercial data available or which can be obtained during the consultation. . . ." Even assuming, *arguendo,* that plaintiffs' claims that EPA has failed to provide the best available science to NMFS when it requested initiation of consultation are true, such a failure by EPA would not result in a failure to initiate consultation as a matter of law as the plaintiffs claim.[5]/ The regulations contemplate the continual exchange of scientific information during the consultation, and it should not be surprising therefore for there to be discussions between the agencies regarding just what may be necessary. The regulations state that during the consultation period, the Services may request the consulting agency obtain and provide additional data and that "[t]he Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard. . . ." 50 C.F.R. § 402.14(f). Accordingly, plaintiffs' claims that EPA has somehow breached this Court's order by allegedly failing to provide the best scientific information at the outset of the consultation, or because NMFS allegedly requested additional information, must fail as a matter of law.

3. EPA's Consultation Initiation is Not Factually Deficient

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[5]/ Plaintiffs also refer to case law discussing the necessity of a biological assessment for the initiation of consultation, Plaintiffs' Motion at 7, but those cases and the requirements for a biological assessment are wholly inapplicable here. The regulations state that formal consultation shall not be initiated by the action agency until "any *required* biological assessment has been completed and submitted" in accordance with 50 C.F.R. § 402.12. 50 C.F.R. §402.14(c) (emphasis added). Biological assessment requirements apply only to "[f]ederal activities that are 'major construction activities.'" 50 C.F.R. § 402.12(b). A "major construction activity" is defined in these regulations as "a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act." Id. at § 402.02. Virtually every court to address the issue has held that a biological assessment is not required unless a major construction activity is involved. Waterkeeper Alliance v. Dep't of Defense, 271 F.3d 21, 31-32 (1st Cir. 2001); Newton County, 141 F.3d at 811; San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 874, 875 (D. Ariz. 2003); American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217, 247 n.18 (D.N.J. 2002). Here, EPA's registration actions under FIFRA do not involve construction, and thus plainly fall outside the ambit of the biological assessment requirements.

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In addition, plaintiffs' claims that EPA failed to provide the best available science fail as a factual matter as well. As discussed above, the substance of EPA's effects determinations and its ongoing consultations with NMFS are not properly before this Court. If the Court, however, chooses to review the substance of EPA's effects determinations and its ongoing consultations with NMFS to assess EPA's compliance with the July 2, 2002 order, EPA will gladly file with the Court an administrative record for review. That record will demonstrate that EPA utilized an extensive scientific risk assessment process and considered the best available data in order to determine whether each of the subject pesticides may affect a listed salmonid.[6]/ To demonstrate the thoroughness of the approach taken by EPA, federal defendants are attaching one example of the findings related to EPA's decision making. See Determination for Coumophos, exhibit 4. As the Court will no doubt see, the determination by EPA is supported by extensive discussion and scientific analysis. It is clearly a reasoned determination, as are all the determinations EPA has made pursuant to this Court's order.

While plaintiffs may disagree with the scientific methodology employed by EPA, such a disagreement does render EPA's action deficient. As this district court has made clear, an agency action is not rendered defective simply because a plaintiff may have a disagreement with the scientific approach taken by an agency. Greenpeace v. National Marine Fisheries Serv., 237 F.Supp.2d 1181, 1190 (W.D. Wash. 2002) (citing Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989)). Upon reviewing EPA's decision documents, it is clear that these determinations represent the best application of the agency's scientific methodology and judgment. In no event does the fact that plaintiffs may disagree with this methodology somehow render these determinations deficient so as to constitute a breach of the Court's order.

II. NEITHER NMFS NOR EPA HAVE EVER STATED THAT EPA'S EFFECTS

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[6]/ In the event the Court determines to evaluate the substantive basis for the EPA determinations, EPA requests leave to file full and complete administrative records for any final agency action, and leave to further brief the standards that should apply to such judicial review of agency action.

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DETERMINATIONS ARE INADEQUATE OR FAIL TO ALLOW FOR CONSULTATION TO HAVE BEGUN, AND IN FACT, NMFS HAS STATED JUST THE OPPOSITE

There is no evidence upon which this Court can rely supporting plaintiffs' position that either NMFS has found EPA's determinations deficient, or that EPA has admitted as much. Plaintiffs principally point to an alleged draft letter by NMFS as evidence that NMFS has taken the position that EPA's determinations are inadequate. Plaintiffs' exhibit 2. This document has no evidentiary value whatsoever. It is unsigned, undated, and not even on the letterhead of the agency from which it purports to originate. Further, plaintiffs admit that the document came not from NMFS, but rather from a Washington State agency. Most significantly, the document has never been adopted or otherwise held out by NMFS as the official position of the Agency. To the contrary, NMFS has recently confirmed in writing, in a letter actually signed by an agency official, that – contrary to the content of the cited document – NMFS remains in consultation with EPA regarding the subject pesticides and has not reached any specific conclusions regarding EPA's determinations of potential risk and remains in consultation. See EPA Letter, exhibit 2; NMFS Letter, exhibit 3. The unsigned draft letter, allegedly written by regional staff, having never been finalized or transmitted, does not, and can not, represent the official position of NMFS.

Courts have consistently held that documents created by federal agency staff that have not been adopted by the agency do not represent the official position of that agency. In South Holland Metal Finishing Co. v. Browner, 97 F.3d 932, 936 (7th Cir. 1996), the court ruled that even a final document by a regional official could not be relied upon as the position of the agency when it had not been adopted by the agency administrator. Similarly, in a challenge to agency action, the Ninth Circuit held that employees' positions are not official positions of the agency. See National Wildlife Feder'n v. United States Army Corps of Eng'rs, 384 F.3d 1163, 1174 (9th Cir. 2004) (staff communications not finalized by agency are not official view of the agency); Save Our Springs Alliance v. Cooke, No. A-01-CA-855-SS, 2002 WL 31757473 *7 (W.D. Tex.

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Nov. 12, 2002) (rejecting argument that the Service did not use best scientific information available because it rejected the views of the field office); Southwest Center For Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 523 n.4 (9th Cir. 1998) (rejecting an argument that the agency was arbitrary and capricious in rejecting a draft reasonable and prudent alternative because "neither the Secretary nor the FWS . . . ever adopted the draft RPA, so it never became the official policy of the Secretary.") If record documents of staff that are actually signed by them or transmitted by them can not, as a matter of law, represent the official agency position, then certainly here the unsigned, untransmitted, draft letter, without letter head, can not rise to such a level. As such, plaintiffs' exhibit 2 lends no support to their arguments that EPA violated the Court's order.

Plaintiffs also point to the fact that EPA has agreed to review its determinations and, where appropriate, update the consultations in accordance with its recent programmatic consultation with NMFS, as evidence that EPA has somehow admitted to flaws in its assessments, rendering them "insufficient" for purposes of complying with the Court's order. Plaintiffs' Motion at 6. EPA readily concedes that it is working with NMFS to assess whether there may be additional data or analyses that could affect the determinations made in the consultations. See Jim Jones letter, October 13, 2004. But EPA has never taken the position that its agreement to review its initiation documents renders them flawed or something less than an "effects determination" as contemplated by the Court. As noted above, Service regulations anticipate that the consultation process may uncover the need for the consideration of additional materials during the consultation. 50 C.F.R. §402.14(d). If anything, EPA's efforts in assessing whether there is a need to supplement the consultations demonstrate that it is in fact doing precisely what the Court and the Service regulations expect EPA to be doing: engaging in meaningful consultations. Indeed, if the statute and regulations forbade this activity, it would be difficult to conceive how the Services and action agencies could conduct meaningful consultations. However, rather than applauding EPA and Service efforts to ensure the completeness of the analysis and database used

to support the consultations, the plaintiffs have decided to construe these efforts as some form of admission against interest in order to seek the Court's assistance in managing the content and pace of the ongoing consultations. As shown above, the agencies' actions constitute no such admission.

CONCLUSION

The plaintiffs argument that EPA has breached the July 2, 2002 order by failing to make effects determinations and by failing to enter into consultation is meritless. In raising this issue, plaintiffs have ignored the legal standards governing such relief, and have ignored the facts that demonstrate EPA's compliance. Furthermore, plaintiffs' representations as to what positions NMFS has taken are directly contradicted by NMFS' stated official position. EPA made its effects determinations, initiated consultation as appropriate in accord with the Court's order, and remains in consultation with NMFS on those determinations. EPA has therefore fully complied with the July 2, 2002 Order.

WHEREFORE, for all the foregoing, defendants request that the Court deny plaintiffs' motion.

Respectfully submitted,

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